93-319

AUG 26 1993

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN P. RASCH,

Petitioner,

VS.

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer under the religious accommodation provision (section 701(j)) of Title VII must prove that it made an active and bona fide effort to accommodate an employee's accommodation request except in those rare instances where a particular job is completely incompatible with a particular religious practice.

2. Whether the trial court could properly grant summary judgment for an employer in a religious accommodation case once the employee had submitted evidence that the employer, upon the exercise of reasonable diligence in an accommodation search, would have found a position which would have provided a reasonable accommodation.

3. Whether an employer must consider using available voluntary substitutes as a means of accommodation regardless of the existence of a bona fide seniority system.

4. Whether an employer violates Title VII by ignoring its own discipline policy for the sole reason that its employee's work absences were compelled by religious beliefs.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Stephen P. Rasch, the petitioner, and National Railroad Passenger Corporation, D/B/A Amtrak, the respondent.

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PETITION FOR WRIT OF CERTIORARI

Stephen P. Rasch petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit. The opinion and judgment of the court of appeals was entered in this case on March 23, 1993. The Petition for Rehearing and Suggestions for Rehearing En Banc was denied by two separate orders both entered on May 28, 1993.

OPINIONS BELOW

The judgment of the Court of Appeals for the District of Columbia Circuit disposed of the case without opinion under D.C. Cir. Rule 14(c) "substantially for the reasons stated by the district court in its October

10, 1991, memorandum opinion." The court of appeals judgment is unpublished and is reprinted in the Appendix herein at 1a, *infra*.[1]

The Memorandum Opinion of the United States District Court for the District of Columbia, which was entered on October 11, 1991, is unreported and is reprinted in the Appendix herein at 6a, *infra*.

JURISDICTION

Invoking federal jurisdiction under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, and under 28 U.S.C. § 1331 (general federal question jurisdiction), the petitioner brought this suit in the United States District Court for the District of Columbia. On October 11, 1991, the district court entered summary judgment in favor of the defendant National Railroad Passenger Corporation (hereafter "Amtrak") and against petitioner Stephen P. Rasch. *See* pp. 6a-18a, *infra*.

On petitioner's appeal, the United States Court of Appeals for the District of Columbia Circuit on March 23, 1993, entered a judgment affirming the district court's judgment. *See* p. 1a, *infra*. Thereafter a timely Petition for Rehearing and Suggestions for Rehearing En Banc was filed with the court of appeals. The court of appeals on May 28, 1993, entered two separate orders denying the petition for rehearing as well as the suggestions for rehearing en banc. *See* 3a-5a, *infra*.

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[1] References to the Appendix to this brief are referred to as "(___ a, *infra*);" references to the appendix to the birefs filed with the Court of Appeals for the District of Columbia are referred to as "(A ___)."

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin,. . . .

STATEMENT OF THE CASE

A. Relevant Facts

During the first week of his employment with Amtrak, petitioner Stephen P. Rasch notified his supervisor that his religious convictions prevented him from working from sundown Friday to sundown Saturday (A 390). Rasch's religious beliefs as a member of the Worldwide Church of God require that he not work during his Sabbath (A 386). He was advised by his supervisor to work the Extra Board because that would be the easiest position to accommodate his Sabbath needs (A 673 at ¶ 18). Rasch was also advised not to seek a transfer to a different location because it would merely transfer the problem rather than resolve it (A 637-38 at ¶ 19).

In order to self-accommodate his religious beliefs, Rasch found a volunteer, E. L. Boyd, who offered to work for him when he needed to be off on his Sabbaths (A 213, 221-22). Rasch also on many occasions went to the Amtrak personnel office to see the posted

vacancy notices (A 410-26). On one occasion, Rasch learned of a controller's position which was available in Washington. Rasch inquired of his supervisors, but he was discouraged from transferring to that position (A 411-13).

Later, Rasch learned of a conductor's job which was available in zone 2 (another work zone). Rasch spoke with one of his supervisors who confirmed that the position was a five day a week job (A 515-20). Rasch also spoke with another supervisor about the possibility of such a transfer, and this supervisor indicated that the zone 2 position would afford him a better opportunity to satisfy his Sabbath needs (A 414-17). Rasch had the qualifications to hold the zone 2 position (A 521). Despite the fact that this position would have made it easier for Amtrak to accommodate Rasch's religious beliefs, his transfer request was denied (A 414-15).

Rasch also asked E. S. Bagley, Amtrak's General Superintendent, whether there was anything that Mr. Bagley would prefer that Rasch do in light of his religious needs (A 419-20). Rasch also sought information about transferring to a conductor's position in zone 4, but when he spoke with his supervisor about such a transfer, he was told that the transfer would merely transfer the problem (A 421-23).

Rasch experienced no difficulty in obtaining his Sabbath hours off through 1977 and up to February 6, 1988 (A 260). A complaint, however, was made by a union representative who did not feel that religion was an acceptable reason for Rasch to be off during his Sabbath. This complaint from a union representative brought the matter to the attention of the Transportation Superintendent for the Washington di-

vision of Amtrak (A 510-14). A counseling session (apparently to counsel Rasch that he should work on his Sabbath) was held. At this counseling session, the Transportation Superintendent for the first time told Rasch that those working on the Extra Board were required to protect all vacancies and that this was a condition of his employment with which he would be expected to comply (A 497).[2]

At that time, the Transportation Superintendent instructed Rasch's supervisors not to permit him off work during his Sabbath hours (A 502-03). It is common practice, however, for Amtrak employees assigned to the Extra Board not to call the crew dispatcher or "mark up" when they have completed an assignment. This practice is known by management. To Rasch's knowledge, however, he is the only employee who has ever been discharged or even been brought up on charges for such a claimed violation (A 201, 398-400).

His supervisors were well aware that Rasch did not mark up after completing work close to the time when his Sabbath was to start. The reason Rasch did not mark up close to his Sabbath was because marking up was in essence a commitment to Amtrak that he

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[2] If Rasch had been told by his supervisors during his first six months at Amtrak that he would not be permitted to have his Sabbaths off while working on the Extra Board, he could have transferred back to his previous employment with C & O (A 427-28). Unfortunately, Rasch was not informed that at Amtrak when an employee is assigned to work the Extra Board, he is expected to be available seven days a week, 24 hours a day. All Rasch understood was that if he was not available for that period of time, he would lose his 40 hours guaranteed pay (A 438-39).

was available for work (A 284). Even though Rasch's supervisors knew that Rasch's religious convictions prevented him from working during his Sabbath, instead of attempting to locate another position to which Rasch could transfer, they brought charges against Rasch demanding his discharge (A 201-02). In disciplining Rasch, his supervisors only focused on Amtrak's absenteeism policy without considering the company's requirement of attempting to accommodate Rasch's religious needs (A 495-96).

Management made no effort to accommodate Rasch's Sabbath requirements prior to his firing (A 201-02, 266, 278-79, 343, 492-93). The first time management attempted to accommodate Rasch's religious needs was after he was fired and reinstated through the grievance process when Stanley Eastman, Amtrak's EEO Manager, informed Rasch's supervisor about the need to accommodate Rasch's religious needs (A 494-95, 496, 508).

Prior to Rasch's discharge, on August 8, 1988, Amtrak's Transportation Superintendent issued Amtrak's guidelines for absenteeism (A 262). The policy required the administration of progressive discipline. Under this policy, an employee must be "advised, in writing, to improve his or her attendance and that failure to do so may result in disciplinary action." (*Id.*). Further, under the policy "[i]f the employee is absent on one (1) other occasion within sixty (60) calendar days following receipt of the letters specified above, formal disciplinary action *may* be instituted." (*Id.*) (Emphasis supplied.)

In Rasch's case Amtrak admits that it did not follow its progressive discipline policy because Rasch's religious beliefs would not permit his working from

sunset Friday to sunset Saturday (A 182 at ¶ 27; 255-56, 262, 273-74, 355-60, 647). Significantly, Rasch was not terminated because Amtrak had exhausted all efforts at attempting to accommodate his religious needs, but rather as discipline for his absences (A 269, 617 at ¶ 13).

B. Amtrak's Motion For Summary Judgment

Pursuant to Local Rule 108(h), Amtrak filed with its motion for summary judgment a statement of material facts as to which no genuine issues exist. Nowhere in Amtrak's statement of material facts does it assert that the seniority provision of the collective bargaining agreement prohibited the voluntary swaps of employees with similar qualifications. Nowhere within the four corners of that document did Amtrak allege any facts to establish that it had sought, but was unable to locate, a position within Amtrak's system to which Rasch could have been transferred which would have accommodated Rasch's scheduling requirements without undue hardship to Amtrak.

Rather, Amtrak's statement of material facts concentrates on the "Extra Board" position to which Rasch was assigned at the time of his discharge from Amtrak detailing the fact that Rasch could not work from sundown Friday to sundown Saturday and thus was repeatedly unavailable for work assignments (*see* A 602-06 ¶¶ 18-42 and A 607-08 ¶¶ 46-51). Amtrak's only assertion of attempts to find a position for Rasch, according to its own statement of material facts, occurred in 1989 after Rasch was fired and subsequently reinstated by Amtrak (A 609-10 ¶¶ 54-60).

C. The District Court's Opinion

The district court specifically found:

(1) Except for certain excused absences which Rasch's immediate supervisor provided during the early days of his employment at Amtrak, "Amtrak took no affirmative action to accommodate Rasch's religious needs." (*See* 12a, *infra*);

(2) "Amtrak took no steps in negotiating with Rasch to reach an accommodation and did not seek the cooperation of the UTU in attempting to satisfy Rasch's religious requirements." (*Id.*);

(3) "Amtrak apparently never explored with UTU the possibility of allowing another employee, A. L. Boyd, to voluntarily work in Rasch's place on Rasch's Sabbath." (*Id.*);

(4) In October of 1988—one month before Amtrak terminated Rasch—an employee junior in seniority to Rasch was awarded an assistant conductor position in Salisbury, North Carolina, a position which did not require Friday evenings or Saturdays work and which therefore could have accommodated Rasch's religious needs. (*Id.*);

(5) "[N]either Amtrak nor Rasch was aware of . . . [the filling of the assistant conductor's position in Salisbury, North Carolina, by an employee junior in seniority to Rasch] until after the position was awarded since neither knew whether an employee senior to Rasch would have applied for the job." (*Id.* at 12a-13a);

(6) "Because of the collective bargaining agreement, the junior employee could not be bumped from the [Salisbury] position until April, 1989, and by that

time Rasch had been terminated from Amtrak employment." (*Id.* at 13a);

(7) After Rasch was reinstated to Amtrak's service as a result of a grievance procedure, on September 30, 1989, Rasch bid on and was awarded the assistant conductor's position in Salisbury, North Carolina, which position accommodated Rasch's Sabbath needs. (*Id.* at 13a);

(8) Amtrak did not dispute that Rasch had met his *prima facie* case in the summary judgment proceeding. (*Id.* at 15a).

The district court examined three alternative means of accommodation which it found that Rasch had proposed to Amtrak: (1) the use of substitutes (*id.* at 16a); (2) the "blanking" of positions (*id.* at 16a-17a); and (3) transferring Rasch to another job within its system (*id.* at 17a).

As to the use of voluntary substitutes to cover for Rasch, the court disposed of this alternative by stating that "[b]ecause assigning substitutes, volunteers or not, to replace Rasch on his Sabbath, would clearly violate the seniority system established by the collective bargaining agreement between Amtrak and UTU, Amtrak need not make such an accommodation." (*Id.* at 16a).

With respect to the "blanking" of positions on Rasch's Sabbath, the court held that though Amtrak could save money by blanking positions, such an accommodation need not be made. The court found that "[b]ecause Amtrak does not regularly blank positions even though it may save money by doing so, and due to the frequency with which Amtrak would have to operate a short crew to accommodate Rasch, blanking

the position would create an undue hardship." (*Id.* at 17a).

With reference to Amtrak transferring Rasch to another job within the organization which would accommodate Rasch's Sabbath, the court looked only at the Salisbury, North Carolina, position stating "[i]t is undisputable, however, that Amtrak could not have known that Rasch could have held that position, or any other position for that matter, until after all of the applications were filled, due to the seniority system under the collective bargaining agreement." (*Id.* at 17a).

The court thereupon concluded "that Amtrak was unable to make any accommodation of Rasch's religious beliefs without suffering undue hardship and, therefore, did not violate the provisions of Title VII." (*Id.* at 18a).

D. Judgment Of The Court Of Appeals

The United States Court of Appeals for the District of Columbia determined that the case did not warrant an opinion and under D.C. Cir. R. 14(c) entered judgment without an opinion, stating:

> The district court set out the "unique circumstances of this case" that established Amtrak's inability to accommodate to Rasch's religious beliefs without undue hardship. We find no cause to disturb the judgment made on the record before that court. It is therefore
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> ORDERED AND ADJUDGED, substantially for the reasons stated by the district court in its October 10, 1991, Memorandum Opin-

ion that the judgment from which this appeal has been taken be affirmed.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

"SABBATARIANS NEED NOT APPLY" is the message broadcast by the courts below. The judicial system has once again diminished the congressional promise of equal employment opportunity. Ironically, although this Court has guaranteed by constitutional interpretation of the Free Exercise Clause of the First Amendment the right of Sabbath-keepers to unemployment compensation, *see Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 883 (1990), a number of circuits, including the circuit court below, have embraced the view that they can negate by judicial interpretation religious accommodation at the labor market which was mandated by the political process.[3]

The decision below is in direct conflict with the Ninth Circuit and is at odds with decisions of the Sixth Circuit as to the proper scope and extent of the duty imposed by the religious accommodation requirement of section 701(j) of Title VII as well as the

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[3] In *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. at 890, the Court found "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself . . . ." Now the political process has been frustrated by the judicial branch, and Sabbatarians once again have been placed at a disadvantage.

teachings of this Court in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

This Court has dealt with the area of religious discrimination on only three occasions. The first was *Dewey v. Reynolds Metals, Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). In *Dewey* the Sixth Circuit held that Title VII's religious discrimination provision did not require a reasonable accommodation. This Court was equally divided, however, as to whether Title VII required an employer to attempt to accommodate the religious needs of its employees. As a result, section 701(j) was added to the 1972 amendments to Title VII on the floor of the Senate without a single dissent. This provision made it an unlawful employment practice for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of its employees and prospective employees.

The second case—*Trans World Airlines v. Hardison*, 432 U.S. 63 (1977)—examined the reach of the religious accommodation provisions of section 701(j) of Title VII, 42 U.S.C. § 2000e(j).

The most recent decision of this Court concerning religious discrimination and accommodation was *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986). *Ansonia*, however, dealt with the narrow question of whether an employer is required to choose from available accommodations the alternative accommodation preferred by the employee and did not deal specifically with the accommodation duty or the undue hardship defense.

Thus, a single decision of this Court has been the sole guidance to the lower courts with regard to the

extent of the accommodation duty under section 701(j) of Title VII and how the undue hardship defense fits in to the legislative scheme of accommodation. The lack of greater guidance by this Court in religious accommodation cases has resulted in courts applying the religious accommodation provisions of Title VII in an uneven and inconsistent manner.

I. An Employer Must Prove That It Made An Active And Bona Fide Effort To Accommodate An Employee's Religious Accommodation Request Except In Those Rare Instances Where A Particular Job Is Completely Incompatible With A Particular Religious Practice.

Through the enactment of section 701(j), Congress placed a burden on the employer to engage in active and bona fide efforts to accommodate the religious needs of its employees and, if unsuccessful, then to demonstrate that it was unable to reasonably accommodate the employee's religious beliefs without undue hardship. *American Postal Workers Union v. Postmaster General*,781 F.2d 772, 775-76 (9th Cir. 1986); *Lake v. B.F. Goodrich Co.*, 837 F.2d 449 (11th Cir. 1988), *cert. denied*, 488 U.S. 826 (1988). Amtrak failed to demonstrate on summary judgment that it engaged in active and bona fide efforts to accommodate Rasch's religious needs, and it certainly has failed to demonstrate an absence of other possible accommodations. Amtrak merely points to Rasch's failure to accommodate himself and berates him for remaining on the Extra Board where he was told to remain by his superiors.

The district court acknowledged that there is a split in the circuits as to whether an employer must dem-

onstrate that it sought to accommodate before attempting to prove undue hardship, stating:

> Rasch argues that if a defendant does not attempt to accommodate an employee's religious needs, it may not raise as a defense the impossibility of accommodation without undue hardship. The court rejects Rasch's argument. Although the cases which Rasch cites, *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403 (9th Cir. 1978), and its companion case, *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397 (9th Cir. 1978), support Rasch's position, subsequent cases have expressly disapproved of those holdings. *See Townley* at 625, citing *Ansonia*, 479 U.S. at 68-69. As the *Townley* opinion states, "If an employer can show that no accommodation was possible without undue hardship, it makes no sense to require that he engage in a futile act." *Id.* Although some courts deciding religious discrimination claims have required employers to show that they have made accommodation efforts, those generally have been in a factual context where accommodation to the employee's religious practices appear possible. *See*, e.g., *EEOC v. Ithaca Industries*, 849 F.2d 116 (4th Cir. 1988), *cert. denied*, 488 U.S. 928 (1988), a case in which the defendant-employer was not bound by a seniority system.

(*See* 14a n.3, *infra.*)

The district court failed to mention other decisions which have held that proof of an effort by the em-

ployer to accommodate the religious practices of an employee is required before the employer can be allowed the undue hardship defense. *McDaniel*, 509 F. Supp. 1055 (W.D. Mich. 1981), *aff'd*, 696 F.2d 34 (6th Cir. 1982). In *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d at 221, the court stated:

> Title VII prohibits an employer from discharging an employee because of his religion. To avoid such unlawful discrimination, an employer must attempt to accommodate an employee's religious needs.

See also Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1, 6 (D. Ore. 1973); *EEOC v.Sterling Merchandise Co.*, 46 FEP Cases 1448, 1454 (N.D. Ohio 1987).[4]

But even the cases which suggest that under specific circumstances the employer need not prove that an accommodation attempt was made as a precondition to introducing evidence of undue hardship still recognize that the exception to the general rule is narrow and extremely limited. In *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986), this Court stated that "the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer *any* reasonable accommodation without such hardship." (Emphasis supplied.) This exception was explained in *Toledo v. Nobel-Sysco., Inc.*, 892 F.2d 1481, 1489 (10th

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[4] The court in *Edwards v. School Bd. of City of Norton, Va.*, 43 F. Supp. 620, 626 (W.D. Va. 1980), in rejecting the employer's "undue hardship" defense, said that "[t]he law requires more direct evidence than personal assumptions subsequently made in a factual vacuum." *Id.* at 627.

Cir. 1989), where the Tenth Circuit said that "it is certainly conceivable that *particular jobs* may be completely incompatible with particular religious practices" and that in those cases "[i]t would be unfair to require employers faced with such irreconcilable conflicts to attempt futilely to resolve them. Employers faced with such conflicts should be able to meet their burden *by showing that no accommodation is possible.*" *Id.* (emphasis supplied).[5]

Here Amtrak did not and cannot claim that a train conductor at Amtrak cannot be accommodated. The fact that conductor positions, for which Rasch was qualified, exist at Amtrak demonstrates the inapplicability of the narrow exception to the active effort requirement.

II. The Trial Court Could Not Properly Grant Amtrak Summary Judgment Since Rasch Submitted Evidence That Amtrak, Upon The Exercise Of Reasonable Diligence, Would Have Found A Different Position For Rasch Which Would Have Accommodated His Sabbath Needs.

Many courts have recognized that the factual uniqueness of Title VII religious accommodation Sabbath observance cases often makes them poor candidates for summary judgment. *See Minkus v. Metro Sanitary Dist.*, 600 F.2d 80 (7th Cir. 1979); *Proctor v. Consolidated Freightways*, 795 F.2d 1472 (9th Cir.

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[5] In *Gordon v. MCI Telecommunications Corp.*, 791 F. Supp. 431, 436 (S.D. N.Y. 1992), the court, quoting *Toledo*, observed that "[w]hile it is 'conceivable' that an employer could carry its burden of proving undue hardship where no attempts were made at accommodation, 'such situations will also be rare.' "

1986); *Drazewski v. Waukegan Develop. Center*, 651 F. Supp. 754 (N.D. Ill. 1986); *Barlley v. West Point-Pepperell, Inc.*, 37 FEP Cases 1785 (N.D. Ga. 1985); *McCormick v. Board of Educ., Belvidere*, 32 FEP Cases 504 (N.D. Ill. 1983).

The determination of what constitutes a "reasonable accommodation" under Title VII and what is an "undue hardship" is a factual determination necessitating a complete development of the record and the taking of testimony on conflicting issues of fact to the extent that conflict exists. Similarly, "[t]he *magnitude* as well as the *fact* of hardship must be determined by the examination of the facts of each case." *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 134 (3d Cir. 1986), quoting *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981).

In this case there is evidence that prior to Rasch's termination on November 16, 1988, there was at least one position that would have accommodated Rasch's Sabbath beliefs. It is the same position that Rasch successfully bid for and received following his reinstatement.

On October 19, 1988, prior to Rasch's firing by Amtrak, an employee junior to plaintiff was awarded an assistant conductor's position in Salisbury, North Carolina, with Friday evenings and Saturdays off (A 583 at ¶ 6). It is thus clear that almost one month prior to plaintiff's discharge by Amtrak (November 16, 1988), there was a position available which plaintiff, because of his seniority, could have filled (and ultimately after his reinstatement through the grievance process did fill).

The district court was factually incorrect when it held that "the junior employee could not be bumped from the position until April, 1989 . . . ." (*See* 13a, *infra.*) In 1988 Rasch was on vacation for three weeks from September 19, 1988, to October 9, 1988 (A 634 at ¶ 4). Under the terms of the agreement between Amtrak and the union, an employee returning to work after being absent less than 30 days by reason of vacation is permitted to exercise his seniority on an assignment advertised and filled during his absence (A 59-60 at ¶ g). Thus, Rasch could have bumped the junior employee.

Upon returning from his vacation, Rasch phoned the crew caller at Amtrak to inquire whether he could hold a job with Saturdays off, but was advised that there was no such position available to him (A 634-35 at ¶ 5). There is no way that Rasch would have then known that an employee junior to him on the seniority roster had bid for the Salisbury, North Carolina position (*id.*).

Had Rasch known of the Salisbury position when he returned from vacation, under the terms of the collective bargaining agreement, he could have transferred to that position. On the other hand, had management personnel explored positions which could have accommodated Rasch, they would have or should have known that this position had been successfully bid by an employee junior to Rasch.

In fact, on October 20, 1989, after plaintiff's reinstatement, Stanley K. Eastman, Amtrak's EEO manager, in answering a letter from plaintiff, stated: "As I understand it, there have been some jobs within zone 5 which would allow you to take Friday evenings and Saturday off." (A 566i). This suggests that there

were more jobs than just the Salisbury, North Carolina, position which, had Amtrak investigated, could have accommodated Rasch's Sabbath requirements.

Since Amtrak prevailed in this case on the basis of a summary judgment, the Court must draw all inferences from the evidentiary sources in the record in a light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). A material issue of fact, therefore, existed which barred the award of summary judgment in favor of Amtrak.

III. The Holding In This Case That An Employer Is Excused From Considering An Accommodation Using Available Voluntary Substitutes Is In Conflict With The Decisions Of Other Circuits And Is Wrong As A Matter Of Law.

First the district court, although acknowledging that Amtrak never explored the possibility of allowing another employee to voluntarily work in Rasch's place (*see* 12a, *infra*), nevertheless erroneously held that "assigning substitutes, volunteers or not, to replace Rasch on his Sabbath would clearly violate the seniority system established by the collective bargaining agreement between Amtrak and UTU, Amtrak need not make such an accommodation." *Id.* at 16a).

This Court in *Hardison*, 432 U.S. at 81-82, observed that section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) "make[s] clear that the routine application of a bona fide seniority system would not be unlawful under Title VII," citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 352 (1977). Neither of the courts below, nor Amtrak, however,

pointed to any specific seniority provision of the collective bargaining agreement as being violated by voluntary swaps. Significantly, it was Amtrak, and not the union, that sought to use the seniority provision of the collective-bargaining agreement as a shield against its statutory obligation to reasonably accommodate.[6]

The decision of the trial court and the summary affirmance in the instant case is in direct conflict with a decision of the Ninth Circuit. In *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), that court faced a claim by an employer that it could not accommodate an employee's religious beliefs as to Sabbath observance "because any attempt at an accommodation would have caused undue hardship on its business." *Id.* at 1513. The court of appeals noted that the employer had relied on *Hardison* "for the proposition that, like TWA, it was bound by its union contract to schedule employees on the basis of seniority and cannot, therefore, be held liable." *Id.*

The Ninth Circuit, however, in a holding directly contrary to the opinion in the case here interpreted this Court's opinion in *Hardison* exactly 180 degrees different from the courts below, stating:

> Appellant's reliance on *TWA* is misplaced. The court in *TWA* addressed the degree of accommodation that was required of an employer within the framework of a seniority system. The court recognized that at a min-

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[6] *See Drazewski v. Waukegan Development Center*, 651 F. Supp. 754, 759 (N.D. Ill. 1986), which rejected the argument that the use of a voluntary swap is a violation of the collective bargaining agreement.

> imum, the employer was required to negotiate with the employee in an effort reasonably to accommodate the employee's religious beliefs. *Id.* at 75, 97 S. Ct. at 2272; *see also Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d at 401.
>
> The employer in *TWA*, for example, made several attempts to accommodate the religious practices of the plaintiff, including: (1) holding several meetings to try and solve the problem; (2) an authorized union search for someone who would exchange shifts, which was normal procedure; and (3) an effort to find another job in the company for the employee. *TWA*, 432 U.S. at 77, 97 S. Ct. at 2273.
>
> In the instant case, the district court found that Hacienda did nothing to solve the problem. Appellant essentially used the seniority provision of the collective-bargaining agreement as a shield against its statutory obligation to reasonably accommodate its employees' religious needs. "[n]either a collective-bargaining agreement nor a seniority system may be employed to violate [Title VII] . . . ." *TWA*, 432 U.S. at 79, 97 S. Ct. at 2274.

Id.

A Sixth Circuit case illustrates the confusion experienced by the courts in interpreting the *Hardison* holding regarding seniority provisions. The district court in *EEOC v. Arlington Transit Mix, Inc.*, 734 F. Supp. 804 (E.D. Mich. 1990), found that the em-

ployee's church attendance requirements could not be accommodated without incurring undue hardship due to the fact that the employer's drivers were represented by the Teamsters Union and worked pursuant to a seniority system. *Id.* at 809. The district court held:

> However, it is not unreasonable for an employer to allot benefits, assignments, shifts, or overtime opportunities by seniority among its employees whether required to do so by union contract or not. Seniority is a universally accepted mode of ranking employees, absent discriminatory purposes. The Court finds that "reasonable accommodation" does not require an employer to remove a more senior employee from the assignment or shift of his choice in favor of the religious preferences of a less senior employee.

Id. at 809.

The Sixth Circuit, however, reversed. First, the Sixth Circuit, citing this Court's decision in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. at 63 n.1, stated:

> Title VII prohibits an employer from discharging an employee because of his religion. To avoid such unlawful discrimination, an employer must attempt to accommodate an employee's religious needs. The extent of this obligation is spelled out in the Act's definition of religion, which reads as follows: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an

> employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

EEOC v. Arlington Transit Mix, Inc., 975 F.2d 219, 221 (6th Cir. 1991).

The Sixth Circuit, in dealing directly with a seniority argument, then stated:

> The new scheduling policy was implemented on June 25, 1987. There is no evidence that, between that date and Taylor's dismissal, Arlington made any effort to find a way to avoid the collision. Mechanic Dana Justice testified that he would have exchanged shifts had he been asked to do so. Abraham acknowledged that he never told Taylor he could switch shifts with Justice if the latter were willing, nor did he discuss the matter with Justice. *At a minimum, Arlington had an obligation to explore a voluntary waiver of seniority rights before terminating Taylor.* After failing to pursue this or any other reasonable accommodation, the company is in no position to argue that it was unable to accommodate reasonably his religious needs without undue hardship on the conduct of its business.

Id. at 222 (emphasis supplied).

The EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. §§ 1605.1-1605.3, 45 Fed. Reg. 72610-15 (1980) (*see* p. 20a, *infra*), in addressing an employer's accommodation duties, states:

> Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

29 C.F.R. § 1605.2(d)(1)(i), 45 Fed. Reg. 72610 (1980).

This Court's holding in *Hardison* does not proscribe the use of voluntary substitutions in the context of a bona fide seniority system. Utilizing such swaps as an accommodation device does not result in rendering a bona fide seniority system unlawful under Title VII. *See Hardison*, 432 U.S. at 82. Neither would the use of such an accommodation result in the denial of the shift and job preference of an innocent employee or deny such an employee his contractual rights which was this Court's concern in *Hardison*. *Id.* at 81.[7]

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[7] In *Boomsma v. Greyhound Food Management, Inc.*, 639 F.

The use of a voluntary swap does not result in penalizing one employee in order to accommodate the religious beliefs and practices of another employee since no worker is placed in a less advantageous position than he or she was in prior to making a swap accommodation. Thus, there would be no "economic penalt[y] . . . imposed on innocent incumbent employees." *See Frank v. Bowmen Transp. Co., Inc.*, 424 U.S. 747, 794 (1976) (Powell, J., concurring in part and dissenting in part). Thus, in striking the balance between accommodating under section 701(j) and respecting the existent seniority system, the balance must tip in favor of the use of a no cost, no harm accommodation such as a voluntary swap.

If the lower courts in the instant case are correct in their interpretation of this Court's holding in *Hardison* mandating an absolute and wooden application of seniority principles over accommodation, then Justice Marshall was surely correct in his *Hardison* dissent when he stated that the majority's opinion "deal[t] a fatal blow to all efforts under Title VII to accommodate work requirements to religious prac-

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Supp. 1448, 1455 (W.D. Mich. 1986), the court rejected the argument that under *Hardison* voluntary substitutions are not a permissible accommodation, stating "[t]he Supreme Court held in *Hardison* only that an employer could not require an employee to fill the overtime hours of another employee who refused to work because of his religious beliefs; it explicitly noted that no employee had volunteered to fill the affected employee's hours in the case before it. *Hardison*, 432 U.S. at 78 and 80-81 . . . ." The court also observed that "[t]he EEOC, moreover, has explicitly recognized voluntary substitutions or swaps as one way for an employer to fulfill its statutory obligation of reasonable accommodation."

tices." *Hardison*, 432 U.S. at 86 (Marshall, J., dissenting).

IV. An Employer May Not Under Title VII Lawfully Ignore Its Own Progressive Discipline Policy For The Sole Reason That An Employee's Work Absences Are Compelled By Religious Beliefs Particularly When The Employer Has Failed To Make Any Active Bona Fide Effort To Accommodate.

Neither the district court nor the court of appeals considered Rasch's contention that Amtrak failed to follow its own progressive discipline policy and as a result violated its duty under Title VII. Once an employer has been told of a Title VII accommodation need, a firing is an abuse of company discipline policy in the absence of actual present hardship to the company or its employees. This is because until facts or circumstances arise from which it can be determined that an accommodation can no longer be provided without undue hardship, Title VII (once triggered on behalf of an employee) requires that the religious needs and practices be accommodated. To set a lesser standard would "emasculate this law designed to protect religious liberty and the free exercise of religious practices." *Brown v. General Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979), quoting *Haring v. Blumenthal*, 471 F. Supp. 1172, 1182 (D. D.C. 1979). Obviously, if there was a position available in Salisbury, North Carolina, which would have accommodated Rasch's religious needs and if information of such a position was reasonably available to Amtrak's supervisory personnel (as it was) before Rasch's discharge, clearly the discharge violated Title VII.

Rasch was fired by Amtrak on November 16, 1988, not because Amtrak had exhausted all efforts at attempting to accommodate Rasch's religious needs without causing undue hardship to the business of the company, but rather purely as a discipline for Rasch's failure to comply with a claimed conflicting employment requirement (A 269, 617 at ¶ 13).

Rasch, in his grievance appeal, specifically claimed the penalty administered to him was unduly harsh and excessive (A 646-47). Amtrak's reason for not administering its progressive discipline policy when it terminated Rasch, however, was based upon the fact that Rasch was unavailable for work due to his religious beliefs. W. L. Pierce, Division Manager of Labor Relations at Amtrak stated:

> Likewise in your case you clearly indicated before the hearing and in your testimony at the hearing that you would not be available for service between sunset Friday and sunset Saturday because of religious beliefs.[8] Therefore, it was clear that progressive discipline would not act as a corrective measure in your case. The record plainly demonstrates that you were guilty as charged. In view of the above, the discipline assessed was not arbitrary, harsh or excessive and your appeal is denied.

In this case not only did Amtrak discharge Rasch for absenteeism, but it did so without utilizing its own

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[8] In order for Rasch to make a *prima facie* case, he is required to notify his employer of the religious reason for the scheduling conflict. Thus, Rasch was treated differently from other employees for carrying out a duty imposed upon him by Title VII.

progressive discipline policy. Its excuse for ignoring its own policy was the knowledge that Rasch's absences were dictated by his religious convictions. If the progressive discipline policy had been followed, Amtrak would have had additional time to look for an accommodation (an accommodation which at a minimum became available in Salisbury, North Carolina, even before Rasch's firing).

In *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986), this Court reversed and remanded with instructions to the lower court to determine whether a collective bargaining provision as to leave with pay had been "doled out in a discriminatory fashion." The Court stated that failure to provide a religious observer with the same employment benefits for religious needs as provided for secular concerns "would display a discrimination against religious practices that is the antithesis of reasonableness." *Id.*[9] Similarly, it was improper for Amtrak to discriminate in the use of its progressive discipline policy on the basis that the work absences resulted from religious compulsion. Amtrak not only violated Title VII by its failure to attempt any accommodation, but it compounded the violation by an intentional act of sidestepping its own progressive discipline policy.

SUMMARY

In summary, this Court should grant certiorari to insure greater uniformity among the circuits in deal-

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[9] Justice Stevens, in a claim brought under the Free Exercise Clause seeking unemployment compensation, underscored the fact that it is "unequal treatment" when benefits are withheld because of an individual's "religiously motivated choice." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring).

ing with the twin issues of "reasonable accommodation" and "undue hardship" which must be addressed in every religious accommodation case.

The district court in its summary judgment opinion stands the religious accommodation requirement of Title VII on its head. The district court not only gutted Title VII's religious accommodation requirements, but it did so without even affording Rasch his day in court when there is, without question, evidence suggesting that when Rasch was fired there was one or more positions available which would have accommodated his religious needs.

The lower courts' decisions here are in conflict and inconsistent with the religious accommodation provisions of Title VII and the EEOC Guidelines on Religious Discrimination. This case is of exceptional importance because if an employer the size of Amtrak can refuse to make any bona fide attempt at accommodation, Title VII's religious accommodation requirements will have become a dead letter.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be granted.

Dated: August 26, 1993

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992
90cv00913

No. 91-7191

Stephen P. Rasch,

Appellant

v.

National Railroad Passenger Corporation,

Appellee

Appeal from the United States District Court for the District of Columbia

United States Court of Appeals for the District of Columbia Circuit

FILED MAR 23 1993

RON GARVIN
CLERK

Before: RUTH B. GINSBURG, WILLIAMS and RANDOLPH, *Circuit Judges.*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of counsel. The court is satisfied that appropriate disposition of the case does not warrant an opinion. *See* D.C. Cir. Rule 14(c).

The district court set out "the unique circumstances of this case" that established Amtrak's inability to accommodate to Rasch's religious beliefs without undue hardship. We find no cause to disturb the judgment made on the record before that court. It is therefore

ORDERED and ADJUDGED, substantially for the reasons stated by the district court in its October 10, 1991 Memorandum Opinion, that the judgment from which this appeal has been taken be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15(b)(2).

Per Curiam
FOR THE COURT:

/s/ Ron Garvin
RON GARVIN, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992
DC CV 90-0913

No. 91-7191

Stephen P. Rasch,

Appellant,

v.

National Railroad Passenger Corporation, d/b/a Amtrak

United States Court of Appeals
For the District of Columbia Circuit

FILED MAY 28 1993

RON GARVIN
CLERK

BEFORE: Ruth B. Ginsburg, Williams and Randolph, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed April 22, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992
DC CV 90-0913

No. 91-7191

Stephen P. Rasch,

Appellant,

v.

National Railroad Passenger Corporation, d/b/a Amtrak

United States Court of Appeals
For the District of Columbia Circuit

FILED MAY 28 1993

RON GARVIN
CLERK

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc,* that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Edwards did not participate in this matter.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-0913 (JHG)

STEPHEN P. RASCH,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,

Defendant.

FILED

OCT 11 1991

CLERK, U.S. DISTRICT COURT DISTRICT OF COLUMBIA

MEMORANDUM OPINION

Plaintiff, Stephen P. Rasch ("Rasch"), filed this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). Rasch alleges that defendant, National Railroad Passenger Corporation ("Amtrak"), wrongfully discharged him for failing to work at times prohibited by his religion and seeks, *inter alia,* recovery of lost wages and employment benefits as a result of the allegedly wrongful termination.

On November 28, 1990, Amtrak moved for summary judgment. Rasch filed his opposition on December 10, 1990 and Amtrak filed its reply on December 20, 1990. In late

December and January, 1991, Rasch filed two motions to strike certain affidavits upon which Amtrak's motion for summary judgment relied. Amtrak filed its last opposition to these motions in February, 1991. In April, Rasch moved for leave to file a motion for summary judgment, which was granted on May 6, 1991. After granting both Rasch and Amtrak extensions of time, Rasch's motion for summary judgment became ripe on June 10, 1991.

Although the Court is sympathetic to the religious needs of the plaintiff and acknowledges the importance of religious accommodation in the workplace where possible, for reasons stated below, the Court grants Amtrak's motion for summary judgment and denies Rasch's motion for summary judgment.

BACKGROUND

The following facts are undisputed. Rasch is a practicing member of the Worldwide Church of God. His religious beliefs require that he not work during his Sabbath hours, from Sundown Friday to Sundown Saturday. In addition, he is not permitted to work during certain feast days, such as Passover, the Day of Atonement, the Feast of Trumpets, and the Feast of Tabernacles.

On April 26, 1987, Amtrak hired Rasch as an Assistant Conductor at its Zone 5 Crew Base, located in Washington, D.C. As an Assistant Conductor, Rasch worked on Amtrak's long-distance passenger trains in Zone 5.[1] He assisted in ensuring that the trains were operated in accordance with safety and operating rules, collected tickets, and performed other related duties. The terms and conditions of Rasch's employment were governed by the collective bargaining agreement between Amtrak and the United Transportation Union ("UTU"). Pursuant to that

[1] Zone 5 encompasses the territory from Washington, D.C. to Atlanta, Georgia and Florence, South Carolina and west to Pittsburgh, Pennsylvania.

agreement, employee assignments are made according to a "bid and bump" system—employees bid on posted positions and then receive their choice of assignments based on seniority.

Because Rasch had relatively low seniority, he ended up working on the "Extra Board" list of Assistant Conductors during all but a few months of his first nineteen months of employment. Extra Board employees do not have a fixed assignment; rather, they are assigned on an as-needed basis to work on trains when the regularly assigned crew members cannot work because of sickness, vacation, training, late arrival of trains, or any other reason. Moreover, the Assistant Conductors for one of Amtrak's regularly scheduled Friday trains always are selected from the Extra Board staff. Extra Board employees are guaranteed full-time pay and benefits, but work rules require them to be on call seven days a week, twenty-four hours per day.

Rasch indicated on his employment application that he could work any shift. Soon after he began work, however, he informed Amtrak that he could not work from sunset Friday to sunset Saturday and on six specific holidays because of his religious beliefs. On several occasions in 1987, Rasch sought the permission of his superior, Al Scala, to be excused from a Friday or Saturday assignment for religious reasons. For a period of time, whenever Rasch requested Scala's permission, Scala excused Rasch from working. Later, other employees began to complain that, in violation of the UTU contract, they were being required to work trips that Rasch should have worked but refused. Eventually, Rasch's attendance pattern was brought to the attention of Washington Crew Base management by the local UTU representative who relayed complaints from other employees. The crew dispatch officer in Philadelphia also informed management of this problem.

Shortly after the Washington Crew Base management learned of Rasch's excessive absences, he was counselled

that it would be necessary for him to comply with the requirements of the Extra Board to which he was assigned. Rasch's attendance record did not change, however. On June 21, 1988, in accordance with the UTU collective bargaining agreement, Rasch was sent a formal notice of investigation concerning his absences. Specifically, he was charged with being absent thirty-two times between February 6, 1988 and June 4, 1988. After the investigation was held, in a hearing pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, Rasch was found to have violated the terms of the UTU contract and was assessed a formal reprimand. That discipline subsequently was expunged from his file, with the warning that further excessive absenteeism would result in dismissal.

Despite the warning, Rasch continued to make himself unavailable for work. Rather than refuse assignments when they were made, Rasch failed to "mark up" in violation of the UTU Extra Board rules. After an employee completes a work assignment, he is required to "mark up," that is, to signify to the crew dispatcher that he is again available for work and should be put back on the Extra Board. Instead of reporting immediately, Rasch routinely waited to call in until it was so late that it was impossible to schedule him for work on Friday or Saturday. As a result of his late mark ups, Rasch was again charged with excessive absenteeism. Following a second investigative hearing, Rasch was dismissed from employment on November 15, 1988.

From April 26, 1987 to November 15, 1988, Rasch was unavailable to work 123 days. On five occasions, regularly assigned employees were required to work Rasch's assignment on their relief days. On twenty-seven occasions, Amtrak was forced to use Extra Board Conductors to fill Rasch's position. Under its collective bargaining agreement with UTU, Amtrak was obligated to pay those Conductors at a higher rate than Rasch would have been paid. On three occasions, Amtrak was forced to fill positions which

were vacant due to Rasch's absences with Assistant Conductors assigned to the Extra Board in other crew cases. According to the collective bargaining agreement, Amtrak was required to pay these substitutes more than it would have paid to Rasch. On three occasions, Amtrak had no available qualified employees to work Rasch's assignment and, therefore, had to operate the train with one less crew member than it ordinarily would have had.[2] Amtrak has

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[2] On December 11, 1990, counsel for Rasch filed a motion to strike the declaration of Joseph M. Fagnani, filed by defendant in support of its motion for summary judgment, which establishes these facts, as well as the corresponding assertions contained in Amtrak's Statement of Material Facts as to Which No Genuine Issue Exists. Fagnani based his statements on a report written by Howard J. Cossabone, which was, in turn, based on source documents not provided to Rasch during discovery. Claiming a right to examine the source documents, Rasch requested that the Court either refuse the application for Amtrak's motion for summary judgment or order a continuance of the motion for summary judgment and require that Amtrak produce the source documents in the interim. In addition, counsel for Rasch argued that the Court may not consider Fagnani's Declaration because it is not based on personal knowledge, does not set forth facts as would be admissible in evidence, and does not show affirmatively that Fagnani is competent to testify to the matters stated therein, all in violation of Fed. R. Civ. P. 56(e).

Concerned with the possibility that the Court might strike Fagnani's Declaration, on December 20, 1990, Amtrak filed Cossabone's affidavit with its Reply Memorandum to Plaintiff's Opposition to Defendant's Motion for Summary Judgment. Cossabone's declaration establishes the same facts substantiated in Fagnani's declaration.

Subsequently, Rasch filed a motion to strike the declaration of Mr. Cossabone, arguing that it is based on source documents not produced during discovery and that it does not satisfy the requirements of Fed. R. Civ. P. 56(e). Rasch also moved to strike the declarations of James M. Maguire, Albert A. Scala and Andrew A. Bell III, also filed with Amtrak's Reply, alleging that, to be valid, those declarations must be filed with an initial motion for summary judgment and not with a reply to an opposition to a summary judgment motion. Further, Rasch renewed its requests that the Court refuse Amtrak's application for summary judgment or, in the alternative, order a continuance and that the

introduced no documentation quantifying in dollars the eco-

Court strike the declaration of Fagnani.

The Court denies Rasch's motions to refuse application of Amtrak's motion for summary judgment and to reopen discovery even for a limited time and scope. The Court acknowledges that counsel for Rasch requested Amtrak to produce "[a]ny and all documents evidencing the nature and extent of any claimed undue hardship on the conduct of defendant's business operations" and that Amtrak did not produce the source records. However, during discovery, Amtrak submitted to Rasch a copy of the Fagnani Declaration which reveals on its face that it was based on an analysis of other records. Rasch, therefore, had notice of the source records and should have specifically requested them before discovery closed. Even after discovery ended, however, Amtrak offered Rasch the opportunity to examine the records in a letter dated December 10, 1990. As of January, 1991, plaintiff had made no effort to arrange to review the documents. Any hardship facing Mr. Rasch, therefore, was caused by his own failure to act.

Mr. Cossabone's declaration contains a list of the number of times Mr. Rasch failed to appear for work and the amount of times that a replacement could be found. Mr. Cossabone, who before his retirement was responsible for the processing and verification of all timecards and time claims for train and engine service employees, prepared the statistical summary after personally reading hundreds of documents, including long sheets, vacancy lists, and extra board standings lists. He states that none of the documents, standing alone, would provide all of the information contained in the declaration. Because the declaration was based on information obtained from reading the records, because the records were admissible under the business record exception to the hearsay rule, because the records were made available to the plaintiff, and because Cossabone is competent to testify to matters in the declaration, the Court will consider it along with other supporting documentation of both parties to this action. The motion to strike Fagnani's declaration is denied.

In addition, the Court will consider the declarations of Scala, Maguire, and Bell. There is no basis for striking the declarations simply because they were filed in support of Amtrak's reply. Amtrak submitted them in response to issues raised by Rasch in his opposition and, therefore, it would be unreasonable to strike them because they did not accompany the initial motion. Moreover, Rasch cannot claim unfair prejudice because the Court has provided Rasch with the opportunity to file additional responses to Amtrak's reply memorandum and declarations accompanying it.

nomic loss it has suffered as a result of Rasch's failure to work during his Sabbath.

Rasch has acknowledged that during his initial tenure with Amtrak, employment vacancies were posted in Amtrak's personnel office and that at least one company official suggested that Rasch go to the personnel office when his attendance problem first arose. Beyond providing these listings, however, and beyond Al Scala's excusals prior to UTU complaints, Amtrak took no affirmative action to accommodate Rasch's religious needs. Amtrak took no steps in negotiating with Rasch to reach an accommodation and did not seek the cooperation of the UTU in attempting to satisfy Rasch's religious requirements. Amtrak apparently never explored with UTU the possibility of allowing another employee, A.L. Boyd, to voluntarily work in Rasch's place on Rasch's Sabbath.

Although Rasch stopped in the personnel office on many occasions to examine the posted positions, he applied for transfer to only one position prior to his termination. That position was for an Assistant Conductor in Zone 2. Pursuant to the collective bargaining agreement, employees transferring from Zone 5 to Zone 2 forfeit their accrued seniority. Therefore, Rasch would have been the most junior employee on the Zone 2 seniority roster. As such, he would have worked on the Zone 2 Extra Board, just as he had on the Zone 5 Extra Board, and would have been subject to the same availability requirements.

In October, 1988, one month before Amtrak terminated Rasch, an employee junior to Rasch was awarded an Assistant Conductor position in Salisbury, North Carolina. The position, previously held by an employee senior to Rasch, did not require the holder to work on Friday evenings or Saturdays, and, therefore, could have accommodated Rasch's religious needs. Although Rasch would have received the position had he applied for the job, neither Amtrak nor Rasch was aware of that fact until after the

position was awarded since neither knew whether an employee senior to Rasch would have applied for the job. Because of the collective bargaining agreement, the junior employee could not be bumped from the position until April, 1989, and by that time, Rasch had been terminated from Amtrak employment.

Rasch was reinstated to Amtrak service on September 30, 1989. At that time, Al Scala informed Rasch that a position was available in Salisbury, North Carolina which Rasch had sufficient seniority to hold and which would permit him to observe his Sabbath. Rasch bid on and was awarded the position. Rasch is now sufficiently senior to continue to hold a position which enables him to observe his Sabbath.

DISCUSSION

Under § 703(a)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2,

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

To establish a *prima facie* case of religious discrimination under this provision, a plaintiff must prove: (1) that he subscribes to a bona fide religious belief that conflicts with an employment requirement, (2) that he informed the employer of this belief; and (3) that he was disciplined or discharged for failing to comply with the conflicting employment requirement. *See Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 133 (3d Cir. 1986), *cert. denied*, 479 U.S. 972 (1986); *Turpen v. Missouri-Kansas-Texas R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984).

Once the plaintiff has established these elements, the defendant has the burden of proving certain facts to avoid liability under the provision. If a defendant has failed to make a good faith effort to accommodate a plaintiff's religious beliefs, the defendant must prove that it would have been impossible to accommodate those religious needs without incurring undue hardship. *See* 42 U.S.C. § 2000e(j) ("The term 'religion' [for purposes of Title VII] includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."). *See also E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614-15 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) ("[w]hen an employer does not propose an accommodation . . . the employer must accept the employee's proposal or demonstrate that the proposal would cause the employer undue hardship"), *citing American Postal Workers Union v. Postmaster General*, 781 F.2d 772, 776 (9th Cir. 1986) and *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1988).[3]

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[3] Rasch argues that if a defendant does not attempt to accommodate an employee's religious needs, it may not raise as a defense the impossibility of accommodation without undue hardship. The court rejects Rasch's argument. Although the cases which Rasch cites, *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978) and its companion case, *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397 (9th Cir. 1978), support Rasch's position, subsequent cases have expressly disapproved of those holdings. *See Townley* at 625, *citing Ansonia*, 479 U.S. at 68-69. As the *Townley* opinion states, "If an employer can show that no accommodation was possible without undue hardship, it makes no sense to require that he engage in a futile act." *Id.* Although some courts deciding religious discrimination claims have required employers to show that they have made accommodation efforts, those generally have been in a factual context where accommodation to the employee's religious practices appeared possible. *See, e.g., EEOC v. Ithaca Industries*, 849 F.2d 116 (4th Cir. 1988), *cert. denied*, 488 U.S. 928 (1988), a case in which the defendant-employer was not bound by a seniority system.

Although Amtrak does not dispute Rasch's assertion that he has met his *prima facie* case, it has moved for summary judgment, arguing that it could not have made any accommodation of Rasch's religious needs without incurring undue hardship. Rasch also has moved for summary judgment, alleging that Amtrak could have accommodated his religious beliefs without undue hardship by transferring him to another position and that Amtrak's failure to do so makes it liable under Title VII.

Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. At the same time, *however*, Rule 56 places a burden on the non-moving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Though Rasch has proposed numerous ways in which Amtrak could have accommodated his religious requirements, under the applicable precedent and based on factual inferences drawn in favor of Rasch, the Court finds that it would have been impossible for Amtrak to accommodate Rasch's religious needs without incurring undue hardship. Therefore, the Court grants Amtrak's motion for summary judgment and denies Rasch's motion for summary judgment.

Rasch has proposed that Amtrak allow him to keep his job as an Assistant Conductor on the Extra Board staff and permit him to observe his Sabbath by finding substitutes to cover for him. However, according to well-settled Supreme Court precedent, such an accommodation would work an undue hardship on Amtrak. In the landmark case of *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), a case with facts remarkably similar to the ones before this Court, the Supreme Court held that it would be an undue hardship to require an employer to alter a facially neutral system for scheduling employees simply to accommodate the religious beliefs of one employee. The Court based its conclusion on Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), by which Congress gave special deference to seniority systems.[4] Because assigning substitutes, volunteers or not, to replace Rasch on his Sabbath would clearly violate the seniority system established by the collective bargaining agreement between Amtrak and UTU, Amtrak need not make such an accommodation.

Rasch further alleges that Amtrak could accommodate his religious needs without incurring undue hardship by "blanking" his position on his Sabbath days—that is, not requiring Rasch to work on his Sabbath and not obtaining a substitute for him. Rasch claims that Amtrak could save money by blanking because even if Amtrak were required to pay extra wages to members of a short crew, the sum

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[4] 42 U.S.C. § 2000e-2(h) provides in relevant part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . ., provided that such differences are not the result of an intention to discriminate because of . . . religion . . . .

Rasch has provided no evidence even remotely establishing that the collective bargaining agreement between Amtrak and UTU was the result of an intention to discriminate because of religion.

of those amounts would be less than what Amtrak would have had to pay Rasch had he worked. Rasch, however, has submitted an affidavit of Salvatore Bruno, an employee of Amtrak, in which Mr. Bruno forcefully asserts that Amtrak makes "every attempt . . . to fill every assignment for a particular train." Bruno deposition at 49, attached to Plaintiff's Memorandum of Points and Authorities in Opposition to Amtrak's Motion for Summary Judgment. Because Amtrak does not regularly blank positions even though it may save money by doing so, and due to the frequency with which Amtrak would have to operate a short crew to accommodate Rasch, blanking the position would create an undue hardship. The district court and the Supreme Court in *Hardison* have held similarly. *See Hardison,* U.S. at 84 n.15; 375 F. Supp. 877, 891 (W.D. Missouri 1974).

Rasch contends further that Amtrak should have transferred him to another job within the organization which would not require him to work on his Sabbath. Specifically, Rasch points to the position in Salisbury, North Carolina which he now holds. It is undisputable, however, that Amtrak could not have known that Rasch could have held that position, or any other position for that matter, until after all of the applications were filed, due to the seniority system under the collective bargaining agreement. Obviously, if Amtrak was not aware that Rasch could have held the position, it could not have transferred Rasch to that position. Moreover, Amtrak did as much as it could to notify Rasch of job openings. Rasch has conceded that Amtrak posts all employment vacancies in its personnel office and that he applied for only one position on the board. Because Amtrak provided Rasch with full notice of employment opportunities, because of the seniority provisions binding Amtrak and its employees, and because Amtrak could not reasonably foresee which jobs Rasch could have held until after all applications were received, the Court holds that under the unique circumstances of

this case, Amtrak did not violate Title VII by failing to locate for the plaintiff a position which would accommodate his religious needs. *See Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (an employee who cannot not work on his Sabbath is required to explore his employer's flexible scheduling system before he can seek additional accommodation from his employer); *Mann v. Chrysler Corp.*, 561 F.2d 1282, 1286 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978) (where employee "will not attempt to accommodate his own beliefs through the means already available to him or cooperate with his employer in its conciliatory efforts he may forego the right to have his beliefs accommodated by his employer").

CONCLUSION

For the reasons stated above, the Court finds that Amtrak was unable to make any accommodation of Rasch's religious beliefs without suffering undue hardship and, therefore, did not violate the provisions of Title VII. On the accompanying Judgment issued this date, summary judgment is ordered in favor of the defendant and against the plaintiff and the plaintiff's motion for summary judgment will therefore be denied.

October 10, 1991.

/s/ Johce Hens Green
JOYCE HENS GREEN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-0913 (JHG)

STEPHEN P. RASCH,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,

Defendant.

FILED

OCT 11 1991

CLERK, U.S. DISTRICT COURT, DISTRICT OF COLUMBIA

JUDGMENT

For the reasons set forth in the accompanying memorandum opinion issued this date, summary judgment is hereby entered in favor of the defendant, National Railroad Passenger Corporation, D/B/A Amtrak, and against the plaintiff, Stephen P. Rasch.

IT IS SO ORDERED.
October 10, 1991

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

APPENDIX F

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

Sec.

1605.1 "Religious" nature of a practice or belief.

1605.2 Reasonable accommodation without undue hardship as required by Section 701(i) of Title VII of the Civil Rights Act of 1964.

1605.3 Selection practices.

Appendix A to §§ 1605.2 and 1065.3 Background information.

Authority: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

§ 1605.1 "Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger,* 380 U.S. 163 (1965) and *Welch v. United States,* 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions.[1] The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in Section 701(j). 42 U.S.C. 2000e(j).

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[1] See CD76-104 (1976), CCH P 6500; CD 71-2620 (1971), CCH P 6283; CD 71-779 (1970), CCH P 6180.

§ 1605.2 Reasonable accommodation without undue hardship as required by Section 701(j) of Title VII of the Civil Rights Act of 1964.

(a) *Purpose of this section.*

This section clarifies the obligation imposed by Title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under Title VII not to discriminate on grounds of religion, nor other provisions of Title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as § 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by Title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) *Duty to accommodate.*

(1) Section 701(j) makes it an unlawful employment practice under § 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[2]

(2) Section 701(j) in conjunction with § 703(c), imposes an obligation on a labor organization to reasonably accommodate the religious practices of an employee or prospective employee, unless the labor organization demonstrates that accommodation would result in undue hardship.

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[2] See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

(3) Section 1605.2 is primarily directed to obligations of employers or labor organizations, which are the entities covered by Title VII that will most often be required to make an accommodation. However, the principles of Section 1605.2 also apply when an accommodation can be required of other entities covered by Title VII, such as employment agencies (§ 703(b)) or joint labor-management committees controlling apprenticeship or other training or retraining (§ 703(d)). (See, for example, § 1605.3(a) "Scheduling of Tests or Other Selection Procedures.")

(c) *Reasonable Accommodation.*

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities such as compensation, terms, conditions, or privileges of employment. Therefore, when there

is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) *Alternatives for Accommodating Religious Practices.*

(1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in Appendix A to §§ 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and "Swaps".

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and

labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.[3]

(iii) Lateral Transfer and Change of Job Assignments.

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices do not permit com-

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[3] On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Pub. I. 95-390. 5 U.S.C. 5530, "Compensatory Time Off for Religious Observances."

pliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

(e) Undue Hardship.

(1) Cost.

An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a *de minimis* cost".[4] The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison,* would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is

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[4] *Hardison, supra,* 432 U.S. at 84.

necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. *Hardison, supra,* 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

§ 1605.3 Selection practices.

(a) Scheduling of Tests or Other Selection Procedures. When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(b) Inquiries Which Determine An Applicant's Availability to Work During An Employer's Scheduled Working Hours.

(1) The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on

these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate Title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification;

and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

Supreme Court, U.S.
FILED
OCT 27 1993
OFFICE OF THE CLERK

No. 93-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN P. RASCH,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, D/B/A AMTRAK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT NATIONAL RAILROAD PASSENGER CORPORATION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, require an employer to attempt accommodation of an employee's religious beliefs where no accommodation is possible without violating a *bona fide* seniority system created by a collective bargaining agreement, and thus imposing undue hardship on that employer?

LIST OF PARTIES

The parties to the proceedings below and to this Petition are: Petitioner Stephen P. Rasch, an employee of the National Railroad Passenger Corporation ("Amtrak"); and Respondent, the National Railroad Passenger Corporation ("Amtrak"), a for-profit corporation created by Congress to operate national rail passenger service.

Respondent has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-319

STEPHEN P. RASCH,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
D/B/A AMTRAK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT NATIONAL RAILROAD PASSENGER CORPORATION'S BRIEF IN OPPOSITION

Respondent National Railroad Passenger Corporation ("Amtrak") respectfully requests that this Court deny the petition for writ of certiorari submitted by Petitioner Stephen P. Rasch seeking review of the decision rendered by the United States Court of Appeals for the District of Columbia Circuit in this case.

COUNTERSTATEMENT OF THE CASE

Petitioner Stephen P. Rasch is employed by Amtrak as an Assistant Conductor. The terms and conditions of his employment are governed by the collective bargaining agreement between Amtrak and the United Transportation Union ("UTU"). Petitioner's Appendix (herein-

after "Pet. App.") at 7a. Petitioner challenges his 1990 termination from Amtrak employment for excessive absenteeism as a failure to reasonably accommodate his religious beliefs in violation of Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), 42 U.S.C. §§ 2000e *et seq.*, even though any possible accommodation would have forced Amtrak to violate the seniority provisions of the UTU Agreement.

The Collective Bargaining Agreement and the "Extra Board"

Amtrak hired Petitioner as an Assistant Conductor at its Zone 5 Crew Base, located in Washington, D.C., on April 26, 1987. Pet. App. at 7a. He bid for this position under the "bid and bump" system established by the UTU Agreement, which awards work assignments according to seniority. Pet. App. at 8a.

Because Petitioner had relatively little seniority initially, he worked the "Extra Board" during substantially all of his first 19 months at Amtrak. *Id.* Extra Board employees do not have a fixed assignment. Instead, they work many different trains on an "as-needed" basis, when the regularly assigned crew members cannot . *Id.* [1] Extra Board employees are guaranteed full-time pay and benefits, but must remain on call seven days a week, 24 hours a day. *Id.*

Petitioner never told anyone at Amtrak that his religion prevented him from working during certain periods before he was hired. Indeed, Petitioner's employment application stated that he could work any shift. *Id.* Then, after he began working, Petitioner began calling in sick frequently, usually on Friday and Saturday, but sometimes on other days as well. Only then did Petitioner inform Amtrak management that he could not work from

[1] Additionally, the Assistant Conductors for one of Amtrak's regularly scheduled Friday trains in Zone 5 always are selected from the Extra Board staff. *Id.*

sundown Friday to sundown Saturday because his religion prohibited him from doing so.[2]

During 1987, Petitioner's supervisor excused him repeatedly from a Friday or Saturday assignment to accommodate his religious needs. *Id.* Thereafter, however, Petitioner's coworkers and their union representative, the UTU Local Chairman, began to complain that their rights under the contract were being violated because these employees were required to work positions that Petitioner refused. *Id.*

In addition, Amtrak management realized, over time, that Petitioner's preferred schedule could not be accommodated because the times he asked to be absent for religious reasons directly conflicted with the train schedule at the Washington Crew Base, which must staff four daily trains. Because Petitioner refused so many assignments, some vacancies had to be filled by Extra Board Conductors, regularly-assigned employees on their relief days, or Extra Board employees from other crew bases entirely—all resulting in additional expenses for Amtrak. Pet. App. at 9a-11a.

When Amtrak was unable to locate another qualified employee to serve as an Assistant Conductor, the Company was forced to operate trains without a full crew, and to pay additional allowances to those employees working as a "short crew." *Id.* At the same time, Amtrak continued to be obligated to pay full benefits to Petitioner. *Id.*

Petitioner made little effort to find a position which would enable him to observe his Sabbath by checking posted vacancies and applying for a transfer, despite suggestions from Amtrak management that he do so. Pet. App. at 12a.

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[2] Petitioner also identified five other periods, each of 24 hours' duration, and one eight-day period during each calendar year, when he could not be available for work because of his religious beliefs. Pet. App. at 8a.

The Disciplinary Process

First, Petitioner was counselled to comply with the Extra Board's on-call requirements. Pet. App. at 8a-9a. When his attendance did not improve, he was formally charged with excessive absenteeism under the disciplinary procedures outlined in the UTU Agreement. Pet. App. at 9a.[3] After a hearing, the excessive absenteeism charge was sustained. Yet, Petitioner was assessed only a formal reprimand. Even that disciplinary action subsequently was expunged from his file, with the proviso that further excessive absenteeism would result in dismissal. *Id.*

Nevertheless, Petitioner's attendance did not improve. *Id.* Accordingly, he was charged a second time with excessive absenteeism. A second hearing established that Petitioner was continuing to violate the UTU contract, to the detriment of both Amtrak and his fellow employees, despite two prior warnings. He was therefore terminated. *Id.*

Petitioner's Reinstatement

Petitioner appealed his dismissal to a Public Law Board, as was his right under the Railway Labor Act. Pet. App. at 13a. The Board affirmed Amtrak's finding that Petitioner was excessively absent in violation of the UTU contract, yet gave him one last chance by reinstating him without back pay. *Id.*

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[3] As required by the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, the UTU agreement establishes a grievance-arbitration procedure for the resolution of employee disputes. An employee charged with a disciplinary offense receives an evidentiary hearing, with union representation, before a Company hearing officer who makes an initial determination as to whether the employee is guilty as charged. The union or employee may appeal any discipline through two levels within Amtrak, and ultimately to arbitration before a Public Law Board, a tribunal established pursuant to the RLA. The Board's findings and award are final and binding on all parties. 45 U.S.C. § 153(p), (q).

Following his reinstatement, Amtrak attempted to accommodate Petitioner's religious beliefs by suggesting that he apply for a different job than he previously had held, which would accommodate his Sabbath. Unfortunately, no such vacancies existed at the time. Amtrak also proposed a special accommodation agreement to Petitioner's union, the UTU, that would exempt him from contractual obligations that conflicted with his religious observances. The UTU declined to make such an agreement.

Ultimately, when a position became available in Salisbury, North Carolina, that Petitioner had sufficient seniority to hold and that would accommodate his religious needs, Amtrak management suggested he apply. Petitioner bid on and was awarded that position. Pet. App. at 13a.

Court Proceedings Below

Petitioner brought suit for lost wages and other relief for religious discrimination under Title VII before the United States District Court for the District of Columbia, claiming that Amtrak had wrongfully discharged him for refusing to work on his Sabbath. Following discovery, the parties filed cross-motions for summary judgment. District Judge Joyce Hens Green granted Amtrak's motion for summary judgment. While acknowledging that Petitioner had proposed numerous ways in which Amtrak could have accommodated his religious needs, the District Court found that it would have been impossible for Amtrak to accommodate him without violating the seniority provisions of the UTU agreement and thus incurring undue hardship, citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80-81 (1977). Pet. App. at 15a-18a. Petitioner's summary judgment motion was denied. Pet. App. at 15a.

The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's decision granting summary judgment for Amtrak without opinion,

in an unpublished decision with no precedential effect. *See* D.C. Cir. Rules 11(c), 14(c). The Court emphasized the "unique circumstances of this case" which rendered Amtrak unable to accommodate Petitioner without undue hardship. Pet. App. at 1a-2a. Both a Petition for Rehearing and Suggestion for Rehearing *en banc* were denied thereafter. Pet. App. at 3a-5a.[4]

REASONS WHY THE PETITION SHOULD BE DENIED

The questions presented by Petitioner do not warrant review by this Court. The courts below properly applied this Court's decision in *TWA v. Hardison.* There is no conflict in the circuits over any issue material to this dispute. Finally, the question here is narrowly confined to a unique set of facts and lacks national or precedential importance.

I. THE D.C. CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S OPINION IN *HARDISON*

Title VII exempts employers from their statutory obligation to accommodate an employee's religious practices where such action would conflict with a *bona fide* senior-

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[4] A number of facts cited by Petitioner on appeal were never presented to the District Court. Specifically, Petitioner asserts that: 1) Amtrak supervision told him to work the Extra Board because that would be the easiest way to accommodate his religious needs (Pet. at 4); 2) Petitioner asked for information about transferring to a conductor position, but was told that a transfer would only "transfer the problem" (Pet. at 5); 3) his supervisors discouraged him from applying for a controller's position (*Id.*); and 4) on returning from vacation, Petitioner asked a crew caller about positions with Saturdays off and was told there were no vacancies, even though such a job allegedly was available. (Pet. at 18-19).

Of course, these issues may not be raised for the first time on appeal or before this Court. An appellant may not attempt to overturn a summary judgment based on factual disputes not previously presented to the district court. *NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 680 (D.C. Cir. 1985). *See also, Tarpley v. Greene*, 684 F.2d 1, 7 (D.C. Cir. 1982).

ity system. *See* 42 U.S.C. § 2000e-2(h) ("[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide* seniority or merit system . . . .")

In interpreting this exemption, the Supreme Court in *Hardison* held that employers are not required to alter neutral seniority systems to accommodate an employee's religious practices, particularly where that seniority system arises out of a collective bargaining agreement, and where variance from the system would adversely affect other employees. *Hardison*, 432 U.S. at 80-81. *Hardison* emphasizes that an employer cannot be forced to violate a collective bargaining agreement in the name of religious accommodation under Title VII. 432 U.S. at 81.[5]

Amtrak's collective bargaining agreement with the UTU is neutral as to religion and explicitly creates rights and expectations in the Union itself, as well as its members. For covered employees, it creates a right to obtain more favorable work assignments based upon seniority, and obligates Amtrak to honor that system.

Like the employer in *Hardison*, Amtrak must award vacancies to those employees who apply, in specific order of seniority, or face contractual liability. Employees who would have a "seniority right" to certain work are entitled to extra payments if that work is assigned to a junior employee in violation of the UTU Agreement.

Because Petitioner asserted that he could not work from sundown Friday to sundown Saturday, Amtrak could not accommodate him and still comply with the seniority provisions of the UTU contract. Specifically, Amtrak was not obliged to arrange transfers for Petitioner, to permit

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[5] The Court held that "it would be anomalous to conclude that, by reasonable accommodation, Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others . . . ." *Id.*

voluntary job assignment "swaps" with other employees, or to create a temporary layoff for him, since such actions would have violated the contract. Accordingly, as *Hardison* teaches, and as the lower courts have held, it was impossible for Amtrak to accommodate Petitioner without incurring undue hardship, and no Title VII violation occurred.

Both the District Court and the Court of Appeals properly rejected Petitioner's argument that Amtrak may not raise an undue hardship defense, unless it first engaged in a useless attempt to accommodate his religious needs. Pet. App. at 2a, 14a n.3. This argument is inconsistent with the language of Title VII, as well as the Supreme Court's decisions in *Hardison* and *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

Subsequent applications of *Hardison* by the federal courts have made clear that an employer satisfies Title VII by showing that *any* possible accommodation would create an undue hardship. *See Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 144 (5th Cir. 1982); *Benefield v. Food Giant, Inc.*, 630 F. Supp. 78, 79 (M.D. Ga. 1985), *aff'd* 792 F.2d 1125 (11th Cir. 1986); *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388 (10th Cir. 1984); *Edwards v. School Bd. of City of Norton, Va.*, 483 F. Supp. 620, 625-27 (W.D. Va. 1980), *vacated in part on other grounds*, 658 F.2d 951 (4th Cir. 1981); *Murphy v. Edge Memorial Hosp.*, 550 F. Supp. 1185, 1188 (M.D. Ala. 1982). As the District Court emphasized in this case:

> If an employer can show that no accommodation was possible without undue hardship, it makes no sense to require that he engage in a futile act.

Pet. App. at 14a, n.3, quoting *Townley*, 859 F.2d at 615 (footnote omitted), citing *Ansonia*.

Even if Amtrak had an obligation to attempt to accommodate Petitioner, the Company clearly has demonstrated that it incurred undue hardship as a result of accommodating his routine absences from sundown Friday to sundown Saturday. The Supreme Court also held in *Hardison* that an employer need not make accommodations that would require it to incur more than a *"de minimis"* cost. *Hardison,* 432 U.S. at 84; *see also, Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. at 64. The Court specifically found that "the costs to [the employer] of . . . paying overtime . . . would have created an undue burden on the conduct of [the employer's] business." *Hardison,* 432 U.S. at 84 n.15.

During his first nineteen months of employment, Petitioner was absent from work a total of 123 days. Amtrak had to compensate the employees filling in for Petitioner at a higher rate of pay than he would have earned, was forced to use Extra Board Conductors at a higher rate than Petitioner would have been paid, and had to fill vacancies left by the Petitioner with employees from other crew bases altogether. Pet. App. at 9a-10a. At times, Amtrak had no alternative but to operate trains with less than a full crew, manifestly diminishing the quality of service available to its passengers, for which Amtrak was required to pay "short crew" allowances to the employees who did work such trains. These are far more than *de minimis* impacts on Amtrak.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioner attempts to pique this Court's interest by characterizing the Circuits' interpretations of *Hardison* as being in conflict. His effort is unavailing.

Proof of Attempted Accommodation

First, Petitioner asserts that the District Court's opinion, as adopted by the Court of Appeals, conflicts with decisions from other courts as to whether the employer

must actually attempt accommodation, no matter how futile, as a condition precedent to arguing undue hardship. Pet. App. at 14-17. As the District Court emphasized in rejecting this argument, however, the decisions Petitioner initially relied upon do not accurately represent the state of the law following this Court's decision in *Ansonia,* and have been expressly disapproved by the same Court of Appeals which issued them. Pet. App. at 14a n.3, citing *EEOC v. Townley Eng'g & Mfg. Co.,* 859 F.2d at 615 n.7 ("[W]e have often allowed an employer who has made no attempt at accommodation to argue as justification undue hardship"), *Burns v. Southern Pac. Transp. Co.,* 589 F.2d 403 (9th Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979), and *Anderson v. General Dynamics Convair Aerospace Div.,* 589 F.2d 397 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979).

Petitioner contends that the District Court ignored other decisions requiring proof of an effort to accommodate. Pet. at 15-17. Yet, these cases are all distinguishable in fundamental ways from the present dispute and from *Hardison. McDaniel v. Essex International, Inc.,* 696 F.2d 34 (6th Cir. 1982), dealt with a claim by a Seventh-Day Adventist who refused on religious grounds to join a union or pay union dues. The Sixth Circuit found *Hardison* inapplicable, since there was no issue of seniority presented, a factor accorded "special status" under Title VII, and no evidence that any employee would be adversely affected if Ms. McDaniel did not join the union. 696 F.2d at 37-38.

In the remaining cases, the employers were not bound by any collective bargaining agreement with respect to the distribution of work assignments, but instead had implemented work schedules that could be waived without contractual liability to any labor organization. *See EEOC v. Arlington Transit Mix, Inc.,* 957 F.2d 219, 221 (6th Cir. 1991) (newly enacted seniority-based scheduling policy for truck mechanics, some of whom were union members: labor agreement did not mandate

scheduling system); *EEOC v. Sterling Merchandise Co.*, 46 Fair Empl. Prac. Cas. (BNA) 1448 (N.D. Ohio 1987) (jewelry store manager required to work Saturdays when most sales made); *Edwards v. School Bd. of Norton, Va.*, 483 F. Supp. at 625-27 (school teacher working under individual contract setting attendance minimum). In contrast, any one of Petitioner's proposed accommodations would have violated the UTU agreement, and thus was not required under *Hardison*.

Claybaugh v. Pac. Northwest Bell Co., 355 F. Supp. 1 (D. Ore. 1973), is a *pre-Hardison* decision, that simply does not support the proposition that an employer may or must take actions which abridge the seniority rights of other employees under a union contract in order to accommodate one individual.

Indeed, Petitioner himself succinctly describes the current state of the law, as applied by the lower courts here:

> "[*particular jobs* may be completely incompatible with particular religious practices" and . . . in those cases "[i]t would be unfair to require employers faced with such irreconcilable conflicts to attempt futilely to resolve them. Employers faced with such conflicts should be able to meet their burden by showing that no accommodation is possible."

Pet. at 17, quoting *Toledo v. Nobel-Sysco., Inc.*, 892 F.2d at 1489.

Working the Extra Board at Amtrak, on an on-call basis, where members must be available 24 hours a day, seven days a week, represents such a "particular job" that happens to be incompatible with Petitioner's "particular religious practise" of not working from sundown Friday to sundown Saturday each week. The lower courts' finding to this effect, based solely on the unique factual circumstances of this case, is entirely consistent with *Hardison* and its progeny.

Use of Voluntary Substitutes

Second, Petitioner attacks the district court's finding that Amtrak need not utilize voluntary substitutes to accommodate his religious needs as in conflict with other circuits and wrong as a matter of law. (Pet. at 20-21.) Once again, his arguments are unavailing.

It is beyond question that an employer is not required to utilize voluntary substitutes to accommodate one employee's religious beliefs, where such actions would violate a *bona fide* collective bargaining agreement. *See, e.g., Cook v. Chrysler Corp.*, 779 F. Supp. 1010, 1024 (E.D. Mo. 1991), *aff'd*, 981 F.2d 336 (8th Cir. 1992) (employer and union *not* obliged to breach labor agreements to accommodate plaintiff where employer would be obligated to pay substitute or replacement workers extra); *Moore v. A.E. Staley Mfg. Co.*, 727 F. Supp. 1156, 1163 (N.D. Ill. 1989) (employer not required to breach multiple provisions of collective bargaining agreement to accommodate employee); *see also, Miller v. Drennon*, 56 Fair Empl. Prac. Cas. (BNA) 274, 278-79 (D. S.C. 1991), *aff'd*, 966 F.2d 1443 (4th Cir. 1992).

Here, the UTU Agreement specifies the order in which employees are to be called on the Extra Board, and provides for penalty payments to employees who are called out of their seniority order. As the District Court properly found, the use of substitutes to exchange with Petitioner would have violated that seniority system and subjected Amtrak to liability, both to the UTU and Petitioner's coworkers. Pet. App. at 16a.

The cases cited by Petitioner do not evidence any conflict whatsoever between the outcome in this action and decisions from other circuits. In *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), liability was justifiably imposed for failing to accommodate an employee's need to observe her Sabbath on Saturday because: 1) the collective bargaining agreement did not require that work assignments be governed by seniority,

only whenever it was "possible and feasible"; and 2) the employer had accommodated a coworker's request for weekends off for non-religious reasons, and obviously could not deny the plaintiff equal treatment. 881 F.2d at 1513 n.7. Such factors are not present in this dispute.

None of the remaining cases upon which Petitioner relies dealt with the situation presented in this case, in which the employer would face liability for violation of any collective bargaining agreement as a result of utilizing voluntary substitutes. *See EEOC v. Arlington Transit Mix,* 957 F.2d at 221-22 (employer unilterally implemented a new work scheduling policy); *Boomsma v. Greyhound Food Management, Inc.*, 639 F. Supp. 1448, 1455 (W.D. Mich. 1986) ("defendant failed to convince the Court that allowing plaintiff to have procured a voluntary substitute would have violated the collective bargaining agreement . . . .") Accordingly, there is no reason for this Court to consider disturbing the lower courts' decision in this regard.

III. THE DECISION BELOW IS LIMITED TO ITS "UNIQUE CIRCUMSTANCES" AND DOES NOT RAISE ANY IMPORTANT ISSUE REQUIRING THIS COURT'S ATTENTION

The remainder of Petitioner's argument is devoted to convincing this Court that it should reexamine the appropriateness of a District Court's factual determinations in granting summary judgment for Amtrak.

As Petitioner himself points out, however, determinations of "reasonable accommodation" and "undue hardship" are fact-intensive inquiries, conducted on a case-by-case basis. Pet. at 18, citing *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 134 (3d Cir. 1986), and *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir.), *cert. denied,* 454 U.S. 1098 (1981). *See also, EEOC v. Hacienda Hotel,* 881 F.2d at 1512, citing *Hardison,* 432 U.S. at 77. Accordingly, such mat-

ters do not warrant this Court's attention, especially since the Court of Appeals' decision is limited to the "unique circumstances" of this dispute.[6]

Given the singular nature of the Amtrak Extra Board, which requires 24-hour a day, seven-day a week availability, there is simply no reason why Supreme Court review is warranted. Few employers outside the railroad industry have such a system. Moreover, the lower courts' opinions emphasize that an employer is excused from attempting accommodation only in those rare circumstances where it is absolutely *impossible* to accommodate an individual's religious needs without incurring undue hardship, such that any attempt would be a "futile act".

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[6] In any event, the lower courts properly rejected Petitioner's arguments on the merits.

First, Petitioner insists that Amtrak was obligated to find him a different job. Pet. at 17-20. This is not the case. *See, e.g., Gibson v. Missouri Pac. R.R.*, 620 F. Supp. 85, 88 (E.D. Ark. 1985), *dismissed*, 786 F.2d 1171 (8th Cir. 1986); *Turpen v. Missouri-Kansas-Texas R. Co.*, 736 F.2d 1022, 1027 (5th Cir. 1984); *McDonald v. McDonnell Douglas Corp.*, 35 Fair Empl. Prac. Cas. (BNA) 1661 (N.D. Okla. 1984); *Ryan v. U.S. Dep't. of Justice*, 950 F.2d 458, 462 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2309 (1992).

Second, Petitioner contends that Amtrak was required to use all of the steps in the progressive discipline process and could not discharge him before doing so—a baseless argument. Pet. at 27-29. As the District Court found, Amtrak did utilize progressive discipline until Petitioner made it abundantly clear that to do so would be an exercise in futility. Pet. App. at 8a-9a. Moreover, neither of the cases he cites deals in any way with progressive discipline. *See Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979); *Haring v. Blumenthal*, 471 F. Supp. 1172 (D.D.C. 1979), *cert. denied*, 452 U.S. 939 (1981). Nor does *Brown* involve any question of an accommodation violating a collective bargaining agreement.

Finally, nothing in the record suggests that Petitioner received any less favorable treatment than other excessively absent Extra Board members. Pet. at 27. Indeed, the entire basis of Petitioner's claim is that he was entitled to special privileges that his coworkers did not enjoy.

As *Hardison* teaches, facially neutral seniority systems for scheduling employees, imposed by collectively bargained agreements, enjoy special status under Title VII. This Court need not revisit that fundamental principle.

CONCLUSION

For the foregoing reasons, Amtrak respectfully requests that the Court deny the Petition for a Writ of Ceriorari.

Respectfully submitted,

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Amtrak's arguments and case citations, taken together with the Petition for Writ of Certiorari, reveal the correctness of one commentator's statement in discussing *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977):

> The Supreme Court interpreted the accommodation requirement in 1977 in *Trans World Airlines v. Hardison*, but in the subsequent decisions no uniformity has yet

> emerged. An examination of the cases since 1977 suggests that courts typically use one of three different models of interest balancing to analyze the varied factual contexts in which religious accommodation issues are presented.

Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trans World Airlines v. Hardison*, 53 Fordham L. Rev. 839, 840 (1985). The same writer further observed that "far from resolving the lower courts' confusion as to the meaning of section 2000e(j)'s accommodation requirement, the Supreme Court's language in *Hardison* has been the foundation for highly divergent applications of the statute." *Id.* at 847-48.

Amtrak's opposition only serves to further highlight the importance of this case in Title VII religious accommodation jurisprudence and illustrates why this Court should grant certiorari. Amtrak, like some courts, has found all provisions of a labor contract -- not just a seniority provision -- impervious to religious accommodation matters; has concluded that *Hardison* proscribes both mandatory and voluntary job swaps contrary to the EEOC Guidelines; and concludes that an employer need not even explore transferring an employee to a different job for accommodation purposes. Amtrak and the lower courts in this case have such a shallow view of the religious accommodation provisions of Title VII that virtually no accommodation duty would be imposed on an employer under such an interpretation. The difference between the various courts' approaches and analyses is the only logical explanation for the differences in the results in many religious accommodation cases.

1. Amtrak erroneously asserts that *Hardison* emphasizes that an employer cannot be forced under Title VII

to violate a collective bargaining agreement in the name of religious accommodation (Resp. Brf. at 7). It is this claimed invincibility of the whole collective bargaining agreement that forms the basis of Amtrak's assertion that it need not even consider using voluntary substitutes as a means of accommodation, even though Rasch had found a volunteer who offered to work his Sabbath for him (A 213, 221-22).

Many circuits have ruled that it is only the seniority provision of a collective bargaining agreement that is removed from a Title VII religious accommodation claim. In *Nottelson v. Smith Steel Wkrs. D.A.L.U. 19806*, 643 F.2d 445, 452 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981), the court stated "that Title VII rights cannot be bargained away and that a collective bargaining agreement therefore does not of itself provide a defense for Title VII violations." In *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982), the court held that Title VII required a union to waive a union security clause in order to accommodate an employee who held religious views against the payment of union dues. Every circuit that has ruled on this issue has held that a collective bargaining agreement must give way to such a Title VII accommodation. *See also Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976), *cert. denied sub nom International Ass'n of Machinists and Aerospace Workers v. Hopkins*, 433 U.S. 908 (1977); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981).

This Court in *Hardison* did observe that section 703(h) (42 U.S.C. § 2000e-2(h)) affords special treatment for seniority systems. 432 U.S. at 81-82. The Court stated that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Id.* at 82. Of course, this is not tantamount to saying that Title VII exempts

employers from their statutory obligation to accommodate an employee's religious practices where there is a bona fide seniority system in place since there may well be -- as there was in the instant case -- other means to accommodate without violating seniority.

Amtrak interchangeably refers to seniority and a collective bargaining contract without distinguishing between the two. This is obviously because Amtrak had to base its defense on general contract language rather than a seniority proviso. Seniority simply is not involved in determining the order of assignment for employees on Amtrak's Extra Board. Amtrak argues that the UTU Agreement specifies the order in which employees are to be called on the Extra Board, and provides for penalty payments to employees who are called out of their seniority order (Resp. Brf. at 12). The relevant provision of the collective bargaining agreement concerning Extra Board assignments, however, states:

> Extra employees will be called first in, first out, as registered on the extra board.

Rule 12(a) of Amtrak's contract with UTU (A 67).

Thus, Amtrak is dead wrong in suggesting that employees working on the Extra Board are to be called in the order of their seniority. Seniority, and the protection afforded seniority by section 703(h), is totally irrelevant to the question of whether a voluntary substitution is a viable accommodation. Permitting A. L. Boyd to work in Rasch's place would not have violated any seniority provision of the collective bargaining agreement. More importantly, permitting Boyd to work in Rasch's place in no way resulted in denying other

employees' their shift and job preferences.[1]

The provision in the contract as to payment states:

> Extra employees who are not called in their turn will be paid the greater of either what they actually earned or the earnings of the assignment(s) they should have been called for, and will retain their place on the extra board.

Rule 12(1) of UTU Contract (A 68).

Even if Boyd worked in Rasch's place, the Extra Board employees would still be "called in their turn." Thus, the substitution accommodation would not have resulted in any extra cost to Amtrak.

Further, both Amtrak and the union had an affirmative responsibility under Title VII to render whatever assistance they might be called upon to give in attempting to work out an accommodation. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971); *Macklin v. Spector Freight Sys., Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973); *Glus v. G.C. Murphy Co.*, 329 F. Supp. 563, 567 (W.D. Pa. 1971).

An employer such as Amtrak had the affirmative responsibility to explore union cooperation in solving the

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[1]The evidence demonstrates that there was no rigid application of the Extra Board assignments. James Maguire, one of Rasch's supervisors, testified that it is common practice for people on the Extra Board to call up and say "mark me off," and the crew dispatcher will let them off without any further explanation (A 347). Supervisory personnel at Amtrak were, however, instructed to treat Rasch's religious requests differently and specifically instructed the crew callers not to permit Rasch to be excused from work during his Sabbath (A 446-47, 453-55).

accommodation requirements which affected both the employer and the union. *Boomsma v. Greyhound Food Mgmt.*, 639 F. Supp. 1448, 1455 (W.D. Mich. 1986). In *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991), the court of appeals rejected the district court's determination that the existence of a seniority system exempted the employer from its accommodation duty. Noting that one of the mechanics testified that he would have exchanged shifts with the employee needing the religious accommodation, the court held that "[a]t a minimum, Arlington had an obligation to explore a voluntary waiver of seniority rights before terminating Taylor." *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d at 222.

The courts below in the instant case, unlike the Sixth Circuit, ended their inquiry upon concluding that the collective bargaining agreement provided for the order of assignment on the Extra Board. But as the court stated in *Shaffield v. Northrop Worldwide Aircraft Serv., Inc.*, 373 F. Supp. 937, 942 (M.D. Ala. 1974), even if a seniority provision of a collective bargaining agreement would prevent voluntary trading, "it may well be that the company's burden includes seeking union consent to some form of variance." There was no showing in this case that the union would have objected to a voluntary trade between Rasch and Boyd nor do the courts below -- or for that matter Amtrak -- explain why such a trade would have violated the seniority rights of other employees.

If, for example, a volunteer such as Boyd was willing to substitute for Rasch on the Extra Board with the understanding that he would be the last to be called in the event that another employee on the Extra Board desired to be called first, it is difficult to see how any Extra Board employee would have been adversely affected or would even object to such an arrangement.

2. Amtrak attempts to demonstrate that the Ninth Circuit's holding in *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), is not in conflict with the lower courts in this case, claiming that in *Hacienda* the labor contract did not require that work assignment be governed by seniority and that Hacienda had accommodated co-workers' requests for weekends off for nonreligious reasons citing a footnote in the court's opinion (Resp. Brf. at 12-13). But the factual amplification in the court's footnote clearly was not the central holding in *Hacienda*. And that court's analysis is at odds with the instant case, demonstrating the fundamental difference in the Ninth Circuit's interpretation of *Hardison* and its religious accommodation analysis from that of the courts below.

The court in *Hacienda*, after observing that a supervisor "admitted that she never asked any maid if they would volunteer to work," *Hacienda*, 881 F.2d at 1513, further noted that "[t]he record also reflects that there was a least one voluntary substitute . . . who was willing to work for her." *Id.* The court discussed the employer's reliance on *Hardison*, which argued that "like *TWA*, it was bound by its union contract to schedule employees on the basis of seniority and cannot, therefore, be held liable." *Id.*

The Ninth Circuit, unlike the courts below, concluded that the existence of a seniority system did not exempt the employer from its statutory duties to accommodate an employee's religious practices. As that court stated, "at a minimum, the employer was required to negotiate with the employee in an effort reasonably to accommodate the employee's religious beliefs." *Id.* The court observed that in *Hardison*, even with a bona fide seniority system in place, TWA "made several attempts to accommodate the religious practices of the plaintiff, including: . . . an authorized union search for someone who would exchange shifts, . . .and . . .

an effort to find another job in the company for the employee." *Id.*

In *Hacienda*, the court stated that "[o]nce the employee has established a prima facie case, the burden shifts to the employer to prove that it made good faith efforts to accommodate the employee's religious beliefs." *Id.* at 1512. According to the court, "[i]f the employer does not propose an accommodation, the employer must accept the employee's proposal or demonstrate that the proposal would cause the employer undue hardship." *Id.* In this case, Amtrak did not negotiate with Rasch, it made no accommodation proposal, and although Rasch proposed the use of a substitute, Amtrak did not show Rasch how the use of a substitute would result in undue hardship to Amtrak's business.[2]

3. As noted in the Petition for Writ of Certiorari, when Rasch was discharged on November 16, 1988, there was an assistant conductor's position at Salisbury, North Carolina, which would have accommodated his Sabbath requirements. (*See* Petition at 18-20.) Although arguably the union may not have been willing to agree to a long-term job swap arrangement, it may well have been agreeable to a temporary arrangement until Rasch completed a transfer to the Salisbury position.

Amtrak does not claim that it engaged in an active and

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[2]Amtrak claims Rasch made little effort to accommodate his own religious needs (Resp. Brf. at 3). This point is disputed. In fact, each time Rasch attempted to accommodate his needs, it was rejected by Amtrak (A 205-07, 213, 224). Although Rasch attempted to work out an accommodation for his religious needs, an employee has no duty to engage in bilateral cooperation until after the employer undertakes initial steps toward accommodation. *Toledo v. Nobel-Sysco., Inc.*, 892 F.2d 1481, 1489 (10th Cir. 1989). But Amtrak never took such steps.

Amtrak does not claim that it engaged in an active and bona fide effort to accommodate Rasch's religious needs or that Amtrak's conductors cannot be accommodated. It fails to even discuss the fact that there is credible evidence that at least one position that would have accommodated Rasch (the Salisbury, North Carolina, position) was available approximately one month before Rasch was fired. In fact, Amtrak does not deny that Rasch could have been transferred to the Salisbury position on October 9, 1988, when he returned to work from a three-week vacation.

Amtrak also does not deny that there were conceivably other positions available that would have accommodated Rasch if Amtrak had only investigated. And of course it does not and cannot deny that on summary judgment there was not a material issue of fact which should have foreclosed the entry of summary judgment on behalf of Amtrak. Amtrak's weak response is that "[g]iven the singular nature of the Amtrak Extra Board, which requires 24-hour a day, 7-day a week availability, there is simply no reason why Supreme Court review is warranted." (Resp. Brf. at 14).[3]

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[3]Amtrak erroneously states that a number of facts cited by petitioner, including Rasch's claim that Amtrak supervision told him to continue on the Extra Board, were never presented to the district court (Resp. Brf. at 6 n.4). This is simply false. (*See* A 685-88.) Amtrak also contends that "Petitioner began calling in sick frequently." (Resp. Brf. at 2). This was refuted at the trial court. According to supervisor Maguire, Rasch had not misinformed Amtrak and "was pretty straightforward." (A 344). It was the crew callers who "automatically put somebody down sick." There simply was no code the crew callers could use for marking off for religious reasons (A 344-45).

Amtrak contends that during Rasch's first 19 months he was absent about 123 days. This was calculated on the basis of a seven-day workweek and represents Rasch's refusal to work Friday night and Saturday before sunset. In fact, there were days Rasch actually worked

But Amtrak avoids the heart of Rasch's claim. A job transfer would avoid the claimed "singular nature" of the Extra Board. Rasch contends that if the Extra Board presented an accommodation problem for Amtrak, it was Amtrak's duty to explore availability of other positions such as the Salisbury position. Rather than allowing Rasch to amass absences on Friday nights and Saturdays, Amtrak should have sought to transfer him to another job assignment as the EEOC Guidelines on Religious Discrimination suggests, 29 C.F.R. § 1605.2(d)(1)(iii) (Pet. App. at 24a).

CONCLUSION

For the above-stated reasons, and for the reasons stated in the Petition for Writ of Certiorari, this Court should grant the Petition.

Dated: November 4, 1993 Respectfully submitted,

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but was charged as absent (A 396). Even so, from January 1 to November 16, 1988, Rasch spent 2280 hours on Amtrak trips which averages over 40 hours per week (A 200, 400, 449-50). Other employees who missed work were not even disciplined (A 399-400), but Rasch was penalized by being denied the 40-hour guarantee (A 438-39) and was subsequently fired.